CONTRACTUAL LIMITATION OF LIABILITY FOR NEGLIGENCE

THE method of growth of the common law, by which its different branches are evolved somewhat independently, and with no specific relation to other branches, does not invite discussion of abstract questions which may have a like bearing in two or more of these independent branches. But the common-law method of reasoning by analogy and the practice of seeking assistance in the solution of questions pertaining to one branch of the law by adopting reasoning which has been applied in the solution of questions more or less similar in other branches, justify the ultimate search for a guiding principle not peculiar to any one legal division when analogous considerations have been taken into account in different divisions for the solution of somewhat similar questions. It may be that in course of time a large number of principles recognized as common in different divisions of the law will thus be differentiated from the mass of the aggregate law to form the framework for a statement of its ruling principles. Such an aggregation of abstract principles subjected to some formal arrangement might be given the rather pretentious title of general "jurisprudence,"—pretentious for the reason that in fact it would furnish a reliable guide for the solution of but few of the actual controversies which would be presented to the courts for decision. Such a possibility hardly justifies the hope that the body of the law can ever be reduced to a strictly scientific arrangement, for such arrangement is constantly being interfered with by change in the relative potency of the forces which are molding it. Perhaps not much more can be hoped for than that a somewhat wider generalization than that now deemed admissible may be resorted to in the solution of some of the problems involved in the adjudication of cases arising in particular branches of the law.

It is scarcely imaginable that any Roman jurisconsult ever had propounded to him the question whether tort liability could be modified or affected by preceding contractual agreement; for a Roman jurisconsult would have been totally unable, from his point of view as to the nature and content of the law, to understand either

our present notions of tort liability or our current theories as to contractual obligations. Nevertheless the abstract question now propounded is of a kind which might have interested a jurisconsult more deeply than it is likely to interest the student who for the time being is giving his specific attention to particular topics of our law. However this may be, the attempt to make a cross section through several legal shoots, so to speak, may prove interesting at least to the extent that some common pattern is discoverable.

It is as impossible as it is undesirable to reason about such a question without starting with the particular conclusions reached in deciding groups of cases which must be relied on as to the logical antecedents of the generalizations which are to be made, for it is characteristic of legal reasoning that it necessarily involves an exercise of judgment as to the weight to be given to countervailing analogies. The aggregate judgment of many minds dealing with similar questions with the common object of reaching the best attainable result will unconsciously be influenced by sociological considerations, and thus the law will adapt itself in form and substance to the conceptions of right and justice which prevail in the social organization of which it is the natural product. This unconscious adaptation through natural growth will probably be more effectual in the long run in keeping the law subservient to the fundamental needs of the social organization than any conscious attempt to readjust it to meet the particular emergencies real or imaginary which any rapid change in social conditions may seem to demand. At any rate there is always the possibility of resort to specific legislation to adapt it more rapidly to such changes of condition. Experience, however, seems to indicate that legislation is an awkward tool in that it lacks the valuable feature of aggregate judgment based on many specific instances which is of great weight in the process of reasoning by countervailing analogies.

The branch of the law furnishing the aptest material for the construction of an abstract rule as to validity of contractual limitations of liability for negligence is that of carriers of goods and passengers. The treatment together of carriage of goods and carriage of passengers, the one involving a bailment, the other constituting a portion of the personal services which one man may undertake to render to another, finds its justification only in the fact of a common conception of public calling,—a conception in it-

self due wholly to sociological considerations and, as applied in the law, rather anomalous. But the common-calling feature has so potently affected the particular conclusions reached within the scope of this branch of the law that it may well be found to furnish the explanation of many distinctions which would otherwise seem artificial.

A rule peculiar to our system of law as distinct from the civil law in relation to the carriage of goods, that the public carrier is absolutely liable for all loss not due to an act of God or the public enemy (as the rule somewhat crudely was stated when first formulated), naturally gave rise almost at once to the practical question whether the common carrier undertaking to discharge his public functions in a particular case might nevertheless by agreement with the shipper be relieved in some measure from this extraordinary liability. And at first no reason seemed to suggest itself why the parties to the transaction might not by an agreement fairly entered into affect the measure of the common carrier's responsibility. The difficulty encountered in particular cases was to determine what constituted an agreement that in the particular case the liability of the carrier should be less than that otherwise fixed by the rule of law.

In the English courts various considerations resulted in the general acceptance of the conclusion that by reasonable notice the carrier might thus limit his liability, although there was a continuing protest against the lessening of a responsibility which it was insisted had originally been recognized on broad reasons of public policy dictated by the nature of the relation which the public carrier has assumed towards society.[1] The English courts in giving consideration to the argument that the carrier was misled by the shipper who, failing to respond to the requirements of a notice calling upon him to state any exceptional value of the package, had practically committed a fraud upon the carrier which should deprive him of any redress, were nevertheless already disturbed by the practical consequence that in recognizing the exemption from liability by the giving of notice, they were enabling the carrier to practically exempt himself from liability even for negligence where the shipper chose for reasons sufficient for himself to omit a declaration of exceptional value. But they seem to have contented

[1] Harris *v.* Packwood, 3 Taunt. 264 (1810); Sleat *v.* Fagg, 5 B. & Ald. 342 (1822); Batson *v.* Donovan, 4 B. & Ald. 21 (1820); Riley *v.* Horne, 5 Bing. 217 (1828).

themselves with the exclusion from the benefit of their rule of a carrier which had been guilty of gross negligence or misfeasance occasioning the loss, and the holding of such carrier liable for the entire value of the package notwithstanding the failure of the shipper in response to the requirements of a reasonable notice to disclose such value to the carrier.[2]

The English courts had assumed in their decisions as to the effect of notice, that the parties to a contract for transportation were at liberty to enter into an agreement as to the extent of the carrier's liability, made by the carrier specially accepting the goods for transportation on conditions different from those imposed by law in the absence of agreement, and they had assumed that the shipper in effect assented to terms of shipment stated by the carrier of which he had reasonable notice if he tendered his goods for shipment without objection to such stipulations; and this was the assumption of the English courts which was first dissented from in the American courts to which similar questions were submitted. It is to be borne in mind in explanation of the readiness with which the American courts reëxamined the whole question of the validity of limitations on carrier's liability that these questions had not arisen in England, or at any rate had not reached any definite solution there until after Independence, so that the conclusions of the English courts had no such antiquity as to justify their being regarded as a part of the common law accepted in this country.[3] The public-service feature of the carrier's business had become more prominent by reason of the introduction of transportation by vehicles operated by steam power resulting in an enormous extension of such business and its concentration in the hands of corporations by whom the general introduction of limitation of liability by notice had been resorted to. It was not unreasonable, therefore, that in the face of these changed conditions the American courts should reach the conclusion that no mere general notice should be assumed to have been assented to by the shipper as against his right to have his goods carried in accordance with the common-law rule of the carrier's extraordinary liability.[4]

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[2] Sleat *v.* Fagg, 5 B. & Ald. 342 (1822).

[3] Fish *v.* Chapman, 2 Kelly (Ga.) 349 (1847).

[4] Hollister *v.* Nowlen, 19 Wend. (N. Y.) 234 (1838); Moses *v.* Boston & Maine R. Co., 24 N. H. 71 (1851); Jones *v.* Voorhees, 10 Oh. St. 145 (1840).

But in connection with the question as to the policy of permitting a carrier to limit his liability by notice, even though brought home to the shipper before shipment had been made, arose at once the further question whether limitation of the strict rule of common-law liability was not against public policy and therefore invalid; for the recognition in England of special acceptances had been unquestioned, although there had been a constant difference of opinion among the judges as to the soundness of the rule permitting limitation by notice; and here again there was a substantial repudiation in America of the views of the English courts, it being insisted that as the strict liability of the carrier was a rule of public policy, a contract limiting it was against public policy. This was the broad position taken by the Supreme Court of New York in *Gould* v. *Hill*[5] and in early cases in Pennsylvania.[6] On the other hand there was a strong inclination to hold that the shipper was competent to make any arrangement he saw fit as to the extent of the liability assumed by the carrier with the suggestion that no question of public policy was involved in the making of such a contract.[7] According to this view the shipper might, if he saw fit, by contract relieve the carrier of the obligation of his public calling and treat him as a private carrier.[8] This line of argument was sufficiently persuasive to induce the Supreme Court of New York to abandon its first announcement in *Gould* v. *Hill*, *supra*, and to sustain contracts by which the carrier was relieved from liability for loss by fire,[9] or even apparently relieving the carrier from liability by a stipulation that the shipment should be at the owner's risk;[10] and the Court of Appeals of New York sustained the validity of such a contract exempting the carrier from all liability save for negligence.[11]

Without citing the innumerable cases constituting the great preponderance of authority in this country, in which it is held that a contract limiting the carrier's liability is not valid if it relieves him from the consequences of negligence, it is interesting to note a peculiar doctrine arrived at in New York, and perhaps not

[5] 2 Hill (N. Y.) 623 (1842).
[6] Beckman *v.* Shouse, 5 Rawle (Pa.) 179 (1835).
[7] New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344 (1848).
[8] Kimball *v.* Rutland & Burlington R. Co., 26 Vt. 247 (1854).
[9] Parsons *v.* Monteath, 13 Barb. (N. Y.) 353 (1851).
[10] Moore *v.* Evans, 14 Barb. (N. Y.) 524 (1852).
[11] Dorr *v.* New Jersey Steam Nav. Co., 11 N. Y. 485 (1854).

elsewhere, that the public policy which vitiates the limitation of liability for negligence does not extend far enough to defeat a contract limiting the carrier's liability for negligence of servants.[12] No explanation of this curious rule of public policy seems imaginable save that of survival of some unconscious, or at any rate unexpressed, conception of limitation of bailment liability by which the bailee had freed himself from any other duty than that of procuring a service to be performed by someone else; for plainly a bailee, as distinct from one undertaking to procure service for another, must under every principle of policy be chargeable for the faults of his servant, and unless he may contract against his own negligence he cannot contract against that of servants engaged for him in the performance of the duty undertaken, whatever it may be.

Another anomaly creeping into the law as to limitation of carrier's liability was that of a distinction between negligence for which it was assumed the carrier might be relieved by contract, and some kind of fault or misfeasance called gross negligence from which a contract exemption would afford him no protection.[13] The difficulty of distinguishing between gross negligence or wilfulness on the part of the carrier or a servant from the consequences of which the carrier cannot be relieved by contract, and that ordinary negligence which Illinois, like New York, assumes to be

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[12] Mynard *v.* Syracuse, etc. R. Co., 71 N. Y. 180 (1877); Bissell *v.* New York Cent. R. Co., 25 N. Y. 442 (1862). But this rule, although sanctioned by a long line of cases in which it had been more often assumed or distinguished than directly applied, was questioned as to its soundness in Nicholas *v.* New York Cent. & H. R. R. Co., 89 N. Y. 370, 373 (1882), in which it is said that "a contract exempting a bailee for hire from the obligation of care on his part, in respect to the goods in his custody, is, to say the least, unreasonable, and, while the law does not go to the extent of making it void on that ground, yet the qualification that to have that effect it must be plainly and distinctly expressed, so that it cannot be misunderstood by the shipper, is so obviously just, in view of the methods of business, and the want of knowledge of the force and construction of contracts on the part of the great mass of persons dealing with the transportation lines of the country, that it ought not to be relaxed."

[13] Chicago & N. W. Ry. Co. *v.* Chapman, 133 Ill. 96, 24 N. E. 417 (1890). The rule thus recognized was originally stated in Illinois in this language: "We think the rule a good one, as established in England and in this country, that railroad companies have a right to restrict their liability as common carriers, by such contracts as may be agreed upon specially, they still remaining liable for gross negligence or wilful misfeasance, against which good morals and public policy forbid that they should be permitted to stipulate." Illinois Cent. R. Co. *v.* Morrison, 19 Ill. 136, 141 (1857).

subject to contractual waiver is so difficult of statement that its reasonableness is from that fact seriously impugned. Something more evidently is meant than the gross negligence which consists in failure to exercise slight care where slight care only is required of the bailee under the classification which Lord Holt attempted so unsuccessfully, save for purposes of confusion, to import into the law of England from the civil law, and which Baron Rolfe was driven to describe as nothing but negligence "with the addition of a vituperative epithet." [14] It would no doubt be safe to limit the gross negligence on the part of a servant, against which, according to the Illinois cases, the carrier cannot contract, to misfeasance or wilfulness, excluding mere inadvertence or inattention however great, save as wilfulness may be inferred therefrom as a matter of fact.[15]

Another illustration drawn from carriers-of-goods cases of the difficulty arising in attempting to answer the question as to the validity of contractual limitations of liability is furnished by the conflict of authorities as to whether an agreed valuation is effectual to limit recovery for a loss by negligence. Leaving out of view the cases of fraudulent misrepresentation on the one hand in which the carrier has been misled into accepting for transportation articles of exceptional value which would not have been accepted as within the nature and scope of his business, or would have been accepted only with extra precautions for safety for which a higher charge would have been made if the nature of the contract had been understood; [16] and also cases where the shipper has been given no real opportunity to have his goods transported otherwise than under a condition limiting his recovery in case of loss to a stipulated sum,[17] — there is a really perplexing question as to the validity of a contract in

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[14] Wilson *v.* Brett, 11 M. & W. 113, 115 (1843).

[15] No doubt the Illinois court assumed that it was stating the English rule, but a reference to the English cases indicates that in prohibiting limitation by notice of liability for gross negligence the English courts meant merely to announce what is the almost universally recognized rule in this country, that as against gross negligence no notice of limitation of liability is effectual. Wyld *v.* Pickford, 8 M. & W. 443, 461 (1841). This interpretation is put on the English cases by Judge Story in Tracy *v.* Wood, 3 Mas. (U. S.) 132 (1822).

[16] The typical case is that of a shipment of money concealed in a nail bag filled with hay. Gibbon *v.* Paynton, 4 Burr. 2298 (1769).

[17] McFadden *v.* Missouri Pac. Ry. Co., 92 Mo. 343, 4 S. W. 689 (1887).

which the rate of carriage is fixed in accordance with the risk assumed by the carrier; that is, a contract in which for the consideration of a lower rate the shipper agrees that the value for which the carrier shall be held liable is in fact less than the real value of the goods. If the loss is due to negligence, this contract is in effect a limitation of liability for negligence and considered from that point of view it ought to be invalid, and many courts have so held.[18] But the view approved by what is no doubt the greater weight of authority is that following the analogy of the fraud cases, the shipper is estopped, after putting a valuation on his goods which must necessarily affect the care which the carrier will exercise in their transportation, from claiming that they are of greater value than represented.[19] On the theory of these cases the agreed valuation is not a contract against liability for negligence, although its effect is to exempt the carrier from liability for that cause beyond the agreed valuation; therefore a state statute forbidding contractual limitation of carrier's liability does not render invalid such an agreement.[20] But under the language of many state statutes prohibiting any contract affecting the carrier's liability, it is plain that the agreed valuation stipulation is invalid;[21] hence the recent decisions of the Supreme Court of the United States giving to the Carmack Amendment the effect of nullifying all state statutes which restrict contractual limitations on the carrier's liability so far as interstate commerce is concerned are of vital importance;[22] for as to interstate commerce these cases sustain uniformly throughout the states, regardless of statutes, the validity of stipulations as to agreed valuation even as to negligence.

[18] United States Express Co. *v.* Backman, 28 Oh. St. 144 (1875); Black *v.* Goodrich Transp. Co., 55 Wis. 319, 13 N. W. 244 (1882); Moulton *v.* St. Paul, M. & M. Ry. Co., 31 Minn. 85, 16 N. W. 497 (1883); Railway Co. *v.* Wynn, 88 Tenn. 320, 14 S. W. 311 (1890); Georgia R. & B. Co. *v.* Keener, 93 Ga. 808, 21 S. E. 287 (1894); Everett *v.* Railroad, 138 N. C. 68, 50 S. E. 557 (1905).

[19] Graves *v.* Lake Shore & M. S. R. Co., 137 Mass. 33 (1884); Hart *v.* Pennsylvania R. Co., 112 U. S. 331 (1884); Ballou *v.* Earle, 17 R. I. 441, 22 Atl. 1113 (1891); Coupland *v.* Housatonic R. Co., 61 Conn. 531, 23 Atl. 870 (1892); Donlon *v.* Southern Pacific Co., 151 Cal. 763, 91 Pac. 603 (1907).

[20] Donlon *v.* Southern Pacific Co., 151 Cal. 763, 91 Pac. 603 (1907).

[21] Lucas *v.* Burlington, C. R. & N. Ry. Co., 112 Ia. 594, 84 N. W. 673 (1900); St. Louis & S. F. Ry. Co. *v.* Sherlock, 59 Kan. 23, 51 Pac. 899 (1898).

[22] Adams Express Co. *v.* Croninger, 226 U. S. 491 (1913); Missouri, Kan. & Tex. R. Co. *v.* Harriman, 227 U. S. 657 (1913); Boston & Maine R. Co. *v.* Hooker, 233 U. S. 97 (1914); Atchison, T. & S. F. R. Co. *v.* Robinson, 233 U. S. 173 (1914).

In the attempt to ascertain the considerations of public policy relied upon in reaching a conclusion one way or the other in carriers-of-goods cases as to whether negligence not amounting to wilfulness or misconduct as a basis of liability may be waived by contract, it is easy to see that substantially two views have been entertained which are inconsistent. In accordance with one view, the common carrier may by contract reduce his liability to that of ordinary bailee, but even as ordinary bailee such limitation of liability does not relieve him as against negligence; while the other view finds it to be contrary to public policy to allow the common carrier who is in a situation of advantage with reference to his individual customer to avail himself of that advantage by making any contract for a relief from his common-law obligations. Considering this diversity of view only from the standpoint of carrier law, it must be admitted that the weight of authority is with the first, with the consequent result as bearing on the abstract question of limitation of liability for negligence in any bailment relation that such contract is against public policy. On the other hand, coming at the question from the viewpoint of general bailment obligation, the second solution would seem more reasonable, for the considerations of public policy in regard to the carrier only forbid his taking advantage of the situation to impose on his customer a limitation to the latter's disadvantage. This solution would not only be more satisfactory in simplifying the law of carrier's liability which otherwise is in a state of inexplicable confusion, but also in suggesting a more consistent result in regard to bailee liability in general where no question of public service is involved; for as negligence is after all only the failure to exercise the care required under the circumstances of the transaction and nothing more, it ought in reason to be open to the parties entering into an ordinary bailment relation to determine for themselves what care is to be expected of the bailee, and there can be no plausible reason suggested why, if the bailee does not fall short of the care to be expected of him, he should be subjected to liability on the ground of negligence.

Perhaps after all the question is one of definition rather than of substance. If the bailee is not negligent he is not liable, and what is usually spoken of as a contractual limitation of liability becomes only a question of contractual definition of duty. According to

this view, the question whether a bailee may by contract limit his liability for negligence would never arise.

In cases relating to passenger-carrier's liability, the validity of contracts exempting the carrier has been approached from a somewhat different angle than in the cases relating to common carriers of goods, for although such carrier is engaged in a public calling he nevertheless is not subjected to any extraordinary liability on that account. It is said that he must exercise the highest degree of care and diligence which human foresight can suggest for the safety of the passenger; but this is said because he employs the dangerous agencies of vehicles propelled by steam or other motive power involving extraordinary danger. It is doubtful whether any well considered case is to be found in which the degree of care required is held to be greater on account of the business in which the carrier is engaged being public rather than private.

As the liability of the carrier of passengers depends therefore solely on his negligence, the general question of the validity of contracts limiting liability for negligence seems to be squarely in issue in the passenger-carrier cases; but unfortunately there is here the same conflict in the decisions of the courts as has already appeared in cases relating to carriers of goods. The inclination seems to have been very strong to declare as a matter of public policy that no such contractual limitation is valid; and by the great preponderance of authority contractual limitation is repudiated wherever the carriage is in pursuance of an agreement or obligation assumed for any consideration of mutual benefit, even though the carriage of the person may be only incidental to some other purpose. Thus in the drover's-pass cases involving contracts by which live stock is transported with the privilege to the shipper of sending someone on the train to accompany the stock, it is generally held that notwithstanding stipulations in the contract to the contrary the carrier is liable for any injuries resulting to such person through the carrier's negligence, the leading case being that of *Railroad Co.* v. *Lockwood*,[23] in the Supreme Court of the United States. On analogous reasoning it has often been held that contracts exempting the carrier from liability in the case of mail agents,

[23] 17 Wall. (U. S.) 357 (1873.) Strong cases to the contrary are, however, numerous. For example, see Pennsylvania R. Co. *v.* Henderson, 51 Pa. St. 315 (1865), and Gallin *v.* London & N. W. R. Co., L. R. 10 Q. B. 212 (1875).

express messengers, and newsboys are invalid.[24] But a fuller discussion of cases of this character has resulted in a marked departure from the broad generalization in the Lockwood Case on the theory that as the passenger carrier is under no obligation in pursuance of his public calling to carry persons who pursue some business or occupation on the train, to whom transportation is merely incidental, a contract relieving the carrier from liability for injury to such persons, even through its own negligence or that of its servants, is valid;[25] and when the courts came finally to consider cases of absolutely gratuitous passage, that is, cases in which there was no consideration whatever to furnish an inducement to the carrier for transportation of a person who was allowed to ride as a mere privilege and not in consequence of any public-service obligation on the carrier's part, the conclusion was reached by a great weight of authority that a stipulation relieving the carrier from any liability whatever (unless it might be for gross negligence amounting practically to wilful injury) was valid.[26] The Supreme Court of the United States approves this rule, qualifying its own assertion in the Lockwood Case against any contractual limitation of liability for negligence.[27]

If, then, there is any general rule to be deduced from the passenger cases it is that the public-service consideration alone prevents contractual limitation of liability for negligence.

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[24] Jones *v.* St. Louis S. W. Ry. Co., 125 Mo. 666, 28 S. W. 883 (1894); Shannon's Adm'r *v.* Chesapeake & O. R. Co., 104 Va. 645, 52 S. E. 376 (1905); Davis *v.* Chesapeake & O. R. Co., 29 Ky. L. R. 53, 92 S. W. 339 (1906).

[25] Griswold *v.* New York & N. E. R. Co., 53 Conn. 371 (1885); Bates *v.* Old Colony R. Co., 147 Mass. 255, 17 N. E. 633 (1888); Hosmer *v.* Old Colony R. Co., 156 Mass. 506, 31 N. E. 652 (1892); Rogers *v.* Kennebec Steamboat Co., 86 Me. 261, 29 Atl. 1069 (1894); Blank *v.* Illinois Cent. R. Co., 182 Ill. 332, 55 N. E. 332 (1899); Russell *v.* Pittsburg, etc. Ry. Co., 157 Ind. 305, 61 N. E. 678 (1901). The Supreme Court of the United States has approved this rule in Baltimore, etc. R. Co. *v.* Voigt, 176 U. S. 498 (1900). The Supreme Court of Illinois seems to have regarded the reasoning in these cases as so persuasive that it has abandoned its exception of gross negligence from contractual limitation of liability. Chicago, R. I. & P. Ry. Co. *v.* Hamler, 215 Ill. 525, 74 N. E. 705 (1905). But there are unqualified denials on the other hand of any validity of a limitation of liability for negligence even in the case of a purely gratuitous passenger. See Jacobus *v.* St. Paul & C. Ry. Co., 20 Minn. 125 (1873).

[26] Quimby *v.* Boston & Maine R. Co., 150 Mass. 365, 23 N. E. 205 (1890); Annas *v.* Milwaukee & N. R. Co., 67 Wis. 46, 30 N. W. 282 (1886); Muldoon *v.* Seattle City Ry. Co., 7 Wash. 528, 35 Pac. 422 (1893); Peterson *v.* Seattle Traction Co., 23 Wash. 615, 63 Pac. 539 (1900).

[27] Northern Pacific R. Co. *v.* Adams, 192 U. S. 440 (1904).

Telegraph companies are engaged in a public calling, though the nature of such calling does not involve liability on their part save for negligence, and it may be assumed that cases relating to the validity of contractual limitation of liability on the part of such companies will throw some light on the general question of limitation of liability for negligence. But unfortunately the courts seem to have failed to make the distinction which is made in cases of carriers of goods between a limitation by mere notice or regulation or condition and a limitation by express contract. Perhaps no such distinction has been practicable in view of the general requirement of such companies that messages be written on a blank, prepared for the purpose, on which express stipulations limiting liability are printed, so that it has been difficult for the sender to comply with regulations as to the method in which the message shall be submitted for transmission, without at the same time impliedly agreeing to such conditions. It would be interesting to note what the rights of the sender would be if he refused to use the blank prepared for the purpose and insisted upon tendering a message for transmission without acquiescing in any conditions or limitations whatever. But a consideration of that question would be aside from the present inquiry as to the general tenor of the views of the courts relating to the validity of conditions of this character.

The English courts readily accepted the analogy of the telegraph company to the common carrier of goods, although in the telegraph business no liability is assumed beyond that of reasonable care, and held that by notice the company could relieve itself from any liability whatever unless an extra charge was paid for the repeating of the message, this requirement being deemed a reasonable regulation where the negligence complained of was not gross or wilful;[28] and although this case was apparently predicated on a statute regulating the business which by its terms authorized reasonable regulations, nevertheless the American courts first considering the question of limitation of liability in such cases assumed this proposition to be sound as a matter of common law, repeating the exception as to fraud or gross negligence on the part of the company or its servants.[29] But the right thus to contract against

[28] MacAndrew *v.* Electric Tel. Co., 17 C. B. 3 (1855).

[29] Ellis *v.* American Tel. Co., 13 Allen (Mass.) 226 (1866); Wheelock *v.* Postal Tel. Cable Co., 197 Mass. 119, 83 N. E. 313 (1908); Breese *v.* United States Tel. Co., 48

liability for negligence was first fundamentally contested in two cases in which the contractual limitation was predicated on a distinction between ordinary day messages sent subject to the established rate and night messages sent at one-half the regular rate, with the stipulation that no liability whatever was assumed in accepting the night message for transmission; and it was held in opinions traversing the whole field of attempted limitation that even under these conditions any contractual limitation involving release from liability for negligence was void as against public policy.[30] In the many states in which the question first was presented for decision after the issue was thus distinctly formed the weight of authority seems to be that any limitation of liability is void.[31] Other courts have contented themselves with holding that the requirement as to repetition does not relieve the company from liability for negligent mistakes such as would not have been avoided by repetition.[32]

In nearly all the telegraph cases in which contractual limitation of liability is held to be invalid the public-service character of the business is emphasized and the conclusion predicated on that ground, although in some of them it is said that conditions embodied in the blank which limit the company's liability may be valid, but not to the extent of relieving it from liability for negligence.[33] But what sort of a stipulation against liability would

N. Y. 132 (1871); Western Union Tel. Co. *v.* Carew, 15 Mich. 525 (1867). This view was adopted by the Supreme Court of the United States. Primrose *v.* Western Union Tel. Co., 154 U. S. 1 (1894).

[30] True *v.* International Tel. Co., 60 Me. 9 (1872); Candee *v.* Western Union Tel. Co., 34 Wis. 471 (1874). In the Maine case there was a vigorous and able dissent by Chief Justice Appleton, but the opinion of the majority of the court in that case has been since adhered to. Bartlett *v.* Western Union Tel. Co., 62 Me. 209 (1873); Ayer *v.* Western Union Tel. Co., 79 Me. 493, 10 Atl. 495 (1887).

[31] Gillis *v.* Western Union Tel. Co., 61 Vt. 461, 17 Atl. 736 (1889); Telegraph Co. *v.* Griswold, 37 Oh. St. 301 (1881); Brown *v.* Postal Tel. Co., 111 N. C. 187, 16 S. E. 179 (1892); Pepper *v.* Western Union Tel. Co., 87 Tenn. 554, 11 S. W. 783 (1889); Reed *v.* Western Union Tel. Co., 135 Mo. 661, 37 S. W. 904 (1896); Western Union Tel. Co. *v.* Short, 53 Ark. 434, 14 S. W. 649 (1890). In the Missouri case the Supreme Court overrules its prior decision to the contrary in Wann *v.* Western Union Tel. Co., 37 Mo. 472 (1866).

[32] Brooks *v.* Western Union Tel. Co., 26 Utah 147, 72 Pac. 499 (1903); Barnes *v.* Western Union Tel. Co., 24 Nev. 125, 50 Pac. 438 (1897).

[33] See, for example, Sweatland *v.* Illinois & Miss. Tel. Co., 27 Ia. 433 (1869); Manville *v.* Western Union Tel. Co., 37 Ia. 214 (1873); True *v.* International Tel. Co., 60 Me. 9 (1872).

be valid is not made clear; it is plain that a stipulation relieving the company from liability for misfortunes occurring without negligence in the use of the uncertain and still slightly understood forces of electricity would not be chargeable to the company even in the absence of such a condition.

Quite pertinent to the present inquiry are suggestions of views in some of these telegraph cases to the effect that regardless of any question of public service an attempt to limit liability for negligence by antecedent contract must necessarily be nugatory.[34] But it cannot be said that this broad reasoning is endorsed by any considerable number of these cases.

The telegraph cases also throw some light, or perhaps it may better be said some additional obscurity, upon the distinction between negligence, which according to some of the cases may be contracted against, and the fraud, wilful misconduct, or gross negligence against which no antecedent agreement will be valid. In the Ohio case[35] it is suggested that gross negligence is perhaps equivalent to fraud or intentional wrong, and in the Vermont case[36] any attempted distinction between negligence and gross negligence is deprecated. In the English case[37] a mistake in transmission of a message to the master of a ship which sent him to a different place than the one designated in the message as written was thought not to constitute gross negligence, while in a Kansas case, apparently recognizing the validity of a contract relieving from liability for ordinary negligence, it was thought that three different and distinct mistakes in the message as transmitted were sufficient to show gross negligence against which no limitation would be available.[38]

In view of the enormous damage which may result to the sender from an apparently insignificant variation in the language of a message as transmitted, which could not reasonably have been foreseen, even where the communication relates plainly to some matter of business, and the inadequacy of the ordinary rate of

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[34] Brown *v.* Postal Tel. Co., 111 N. C. 187, 16 S. E. 179 (1892); Candee *v.* Western Union Tel. Co., 34 Wis. 471 (1874).

[35] Telegraph Co. *v.* Griswold, 37 Oh. St. 301 (1881).

[36] Gillis *v.* Western Union Tel. Co., 61 Vt. 461, 17 Atl. 736 (1889).

[37] MacAndrew *v.* Electric Tel. Co., 17 C. B. 3 (1855).

[38] Western Union Tel. Co. *v.* Crall, 38 Kan. 679, 17 Pac. 309 (1888).

compensation in cases involving so large a responsibility, it would seem reasonable that in analogy with the agreed valuation permitted by many courts as a basis for differentiation in rates and in liability, some form of limitation of risk where no extraordinary liability was made known and corresponding compensation paid ought to be sustained. But the attempt to limit liability to the price paid for transmission of a message in case an additional charge is not paid for repetition is so plainly an effort to avoid any substantial responsibility for negligence that it has been with practical unanimity disregarded and no other method of apportioning compensation to risk seems to have been devised.

In conclusion, it may fairly be said that there is no general concurrence of views on the part of the courts in a broad proposition that aside from public-service undertakings an antecedent contractual release from liability for negligence which has no characteristic of wilful or intentional wrong is void; while the public-service cases only indicate a general concurrence of view to the effect that obligations to those who are entitled to such service cannot be reduced by any such stipulation.

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